CITY-85-020-BC
2-2101-40-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF INVER GROVE HEIGHTS

In the Matter of the City of Inver Grove Heights vs. Burnell Beermann, d/b/a Beermann Services.

EVIDENTIARY DETERMINATIONS, FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge, acting as Hearing Officer for the City of Inver Grove Heights, on August 21 and 22, 1985, September 23, 1985, October 15, 16, 17 and 23, 1985, November 15, 18, 19 and 22, 1985, December 27 and 18, 1985, February 26, 1986 and March 3, 1986. At the request of counsel, certain evidentiary rulings were deferred so that legal concerns could be discussed in final post-hearing briefs.

Appearances: Vance B. Grannls, Jr and David L. Harmeyer, Attorneys at l-aw, 403 Norwest Bank Building, 161 No. Concord Exchange, South St. Paul, Minnesota 55075, appeared on behalf of the City of Inver Grove Heights (City); and Richard G. Nadler, Attorney at Law, 711 Degree of Honor Building, St. Paul, Minnesota 55101, appeared on behalf of Burnell Beermann, d/b/a Beermann Services (Beermann or Beermann Services).

The record herein closed on May 29, 1986, with the receipt by the Hearing Officer of the final post-hearing written submission by counsel.

Following the issuance of this Report, the matter will be considered by the Inver Grove Heights City Council which has the ultimate authority to acc ept modify, or reject any of the Fi ndings or Conc I usions as WE II as to make the final decision regarding any action respecting the conditional use permit of Beermann Services. Persons desiring to file exceptions to this Report or appear before the City Council in connection with this matter should contact City Attorney Timothy Kuntz, 402 Drovers Bank Building, South St. Paul, Minnesota 55075, to determine what rights and procedures are applicable to any further action in this proceeding. The provisions of the Minnesota Administrative Procedures Act relating to contested cases, Minn. Stat. 14.57 - 14.69 (1985), do not apply to this proceeding.

EVIDENTIARY RULINGS

1. Objections to City photographs contained in City Ex. 11 city Ex. 14
and City Ex. 16, based on an asserted trespass by the City inspector on Beermann property have been withdrawn by Beermann and such exhibits are admitted for all purposes.

2. Beermann Exhibits 31, 32, 33 and 34, reports by the City inspector,
Mr. Roesler, regarding other haulers inspected are received TR. 758.

3. Beermann Exhibit 54 is received for the limited purposes of demonstrating intent and the sequence of execution of the Land Use Agreement-Condil.iorial Use Permit. TR. 1157.

4. Beermann Exhibit 64, a collection of pictures offered on the issue of selective enforcement are relevant and the pictures in this exhibit are admitted as demonstrating conditions existing on the premises which are the subject of the particular pictures. The writ-ten commments in the exhibit describing asserted violations of the City Code are not admitted to establish the fact of the of violations asserted. Minnesota Rules of Evidence 401; Boland v. Morrill, 270 Minn. 86, 98-99, 132 N.W.2d 711, 719 (1965).

5. Beermann Exhibit 69, a portion of the record of the 1980 court proceeding involving Beermann and the City, is received. TR. 2343.

6. Beermann Exhibit 91, written correspondence from Mr. Beermann to the City in 1983, is received. Tr. 3212.

7. City Exhibit 100, a collection of City abandoned vehicle enforcement reports is received. Minnesota Rules of Evidence 401.

8. Beermann Exhibit 101, a portion of the record in Illetschko V. City of Inver Grove Heights, is admitted for the limited purpose of demonstrating the position of the City regarding the ability of Triangle Disposal to use property for recycling and solid waste disposal as that position may be inconsistent with the City's treatment of Nitty, Oehrlein and Rauschnat as regards the permitted use of land zoned agricultural.

9. Beermann Exhibit 102, a letter from the City planning director, Mr. Meeker, to Beermann dated August 11, 1983, and Beermann Exhibit 103, a letter from Meeker to Beermann dated June 21, 1983, are received.

## STATEMENT OF ISSUES

The issues for determination in this proceeding are: (1) whether Burnell Beermann, d/b/a Beermann Services has violated the Land Use Agreement bated May 11, 1981, which is asserted to be the Conditional Use Permit- governing the conduct of his business as a rubbish hauler and recycler within the City of Inver Grove Heights: and (2) if so, what action, if any, should be taken by the City Council against his Land Use Agreement-Conditional Use Permit.

Based upon the evidence presented at the hearing and all the files, records and proceedings herein, the Hearing Officer makes the following:

## FINDINGS OF FACT

1. The City of Inver Grove Heights is a municipal corporation organized under the laws of the State of Minnesota.

2. Burnell Beermann, d/b/a Beermann Services, is a resident of Inver Grove Heights and has operated a trash hauling and recycling business in Inver Grove Heights. Since the conclusion of the hearing herein, Beermann has sold the rubbish hauling portion of his business.

3. Beermann applied to the City of Inver Grove Heights for a Conditional Use Permit in 1967. After a hearing in District Court, the Court determined, on June 12, 1968, that the City Council had granted Beermann a conditional use permit for the operation of an open sales lot, open storage and off-street parking on a parcel zoned Limited Industrial (1-1) located at 6900 Dixie Avenue in Inver Grove Heights, Dakota County, Minnesota. Ex. 2.

4. The City Council's approval and continuation of this conditional use permit was subject to Beermann meeting a number of conditions, including but not limited to, the following:

A. The construction and maintenance of a six-foot solid opaque fence by May 15, 1967, in accordance with the site plan submitted by Beermann at that time;

B. That storage items, such as steel drums, salvage, metal stored In steel drums, and other items directly connected with Beermann's rubbish business be stored behind screen fencing and that there would be no dismantling activity for storage or sale i tems Also, all items not stored in steel drums had to be removed from the premises within one month;

C. That no odoriferous, combustible or decomposable materials would be present on the site;

D. That off-street parking parallel to Frances Street (Dixie Avenue) (except where properly blocked) would be provided and used by all employees as well as for all vehicles used in Beermann's rubbish and landscaping business. Also, adequate dust control measures had to be taken for the off-street parking area;

E. on site sales for Beermann's rubbish business would be limited to storage drums. Ex. I.

S. On Aprili 22, 1974, the City Counci I approved Beermann's request for a variance to minimum lot size and setbacks on his property. The City Council's variance approval was subject to a number of conditions, including the condition that Beermann keep the property entirely free of junk and debris. Ex. 3.

6. Beginning in 1974, Beermann began acquiring surrounding land in Cleveland Park and O.M. Johnson's Addition in the City of Inver Grove Heights. He expanded his operations beyond the confines of the area originally approved for a conditional use permit.

7. Between the mid 1970's and 1981, Beermann was cited by the City numerous times for violations of his conditional use permit. These citations were dismissed upon Beermann's repeated promises to bring the property into

compliance with the existing conditional use permit. Beermann did not comply with the conditions of his conditional use permit. Ex. 78; Ex. 79.

S. In 1980, a criminal proceeding was commenced in the County Court by the City against Beermann, alleging violations of the 1967 conditional use permit and the 1974 variance conditions.

9. A hearing on the criminal complaint was held before Judge Martin J. Mansur on December 15, 1980. Mr. Beermann was represented by counsel. The parties, through counsel , stipulated to a dismissal of the criminal action with the file transferred to the district court for treatment as a civil action and the granting of injunctive relief against Beermann in favor of the City. Judge Martin Mansur, on December 15, 1980, found that Beermann was in violation of his conditional use permit and ordered that Beermann cease the violations and then remain in compliance.

10. On or about December 17, 1980, Beermann applied to the City of Inver Grove Heights for an amended conditional use permit. This request was approved by the City Council on May 11 , 1981 .

11. At Beermann's request, Beermann and the City entered into a Land Use Agreement dated May 11, 1981, whereby the City permitted specific uses at 6900 Dixie Avenue East on nine sites demarcated in the Land Use Agreement in return for Beermann's agreement to perform the conditions contained in the Agreement pertaining to each site. Ex. 4; Ex. 57. The Land Use Agreement was adopted by the City Council as Beermann's Conditional Use Permit.

12. Beermann was represented in the 1981 proceedings before the City Council by experienced counsel who reviewed the draft agreement that was submitted to the Council in conjunction with an environmental planner selected by Beermann. Beermann and his counsel participated in the negotiations with the Counci I regarding the final content of the Agreement and Beermann reviewed the Agreement before he executed it.

13. The Land Use Agreement, approved by the City Counci I on May I 1 , 1 981 , as the Conditional Use Permit, except as subsequently amended and interpreted, governs the conduct of Beermann's business at 6900 Dixie Avenue East in the City of Inver Grove Heights. The later execution of the Agreement by Beermann and the Mayor of the City was a ministerial act which did not affect the validity of the Conditional Use Permit approved by the City Council on May 11, 1981, or alter the terms of the Agreement.

14. As a result of the City and Beermann entering in to the Land Use Agreement, Judge Mansur's December 15, 1980 Order was amended by District Judge Jerome Kluck, who, in his Order dated July 15, 1981, directed Beermann to conduct his business in accordance with the Land Use Agreement. Ex. 7. Judge Kluck's Order of July 15, 1981, made in the form of a mandatory injunction, was entered at the request of counsel for Beermann and has never been attacked by Beermann or in any way modified.

15. In 1983, a court action was again commenced by the City against Beermann alleging violation of the 1981 Land Use Agreement-Conditional Use Permit. On January 9, 1984, the City Council amended the 1981 Land Use Agreement and the court action was dismissed. Ex. 9; Ex. 10; Ex. 60.

16. On or about January 30, 1985, Adeline Colburn, a resident of property near the Beermann premises, commenced a lawsuit against Beermann asserting violations of the Land Use Agreement and joined the City for failure to enforce the Agreement against Beermann. This lawsuit is pending in District Court.

17. On September 1, 1984, Mr. Manuel Roesler was asked by the City Administrator to discuss a consulting contract regarding land use matters with the City Attorney. Mr. Roesler was an experienced inspector. The City and Mr. Roesler subsequently entered into a consulting contract whereby Mr. Roesler acted as the City Health Inspector. After the execution of the consulting contract Mr. Roesler was asked by the City Planning Director and the City Administrator to inspect the Beermann property for compliance with the Land Use Agreement. Although Mr. Roesler had inspected all other rubbish haulers in the City limits during the summer of 1985,, he was only initially instructed to inspect the Beermann premises.

18. On or about February 15, 1985, Mr. Roesler made an announced inspection of the Beermann premises and submitted a report to the City, listing asserted violations of the Land Use Agreement by Beermann. Ex. 11; Ex. 25.

19. Subsequent to the initial inspection, Mr. Roesler consulted with the City staff and legal counsel for the City. He was instructed to reinspect the Beermann premises and take pictures of the site. Mr. Roesler made several additional inspections of the Beermann premises and took photographs.

20. On May 30, 1985, Mr. Roesler again reinspected the Beermann premises and reported to the City that the condition of the property continued to be in violation of the 1981 Land Use Agreement, as amended. Ex. 14.

21. At all times material hereto, Beermann has been in violation of the 1981 Land Use Agreement-Conditional Use Permit, as amended, in the following respects:

A. Storage on Site I in violation of Section I and Section 1, Site I Use. City Ex. 11, Site I pictures; City Ex. 16, p. 5 - Upper picture; Ex. 16, p. 18, lower picture; P 37 of Attachment to Ex. 67, Brett Helsa Debris Report, February 18, 1985; Tr. 259; TR. 1879.

B. Storage on Site 2 in violation of Section 1 and Section 2, Site 2 Use. city Ex. 11, Site 2 pictures; City Ex. 16, p. 5, upper picture; p 37 of Attachment to Ex. 67, Brett Helsa Debris Report, February 18, 1985; TR. 260, TR. 1898.

C. Storage and other activity on Site 3 in violation of Section 1 and Section 1, Site 3 Use-, Curb stops installed on Site 3 in violation of Section 1, Site 3, Conditions Imposed (b). City Ex. 11, Site 3 pictures; City Ex. 14, p. 1, upper and lower pictures; City Ex. 16, p. 10, lower picture; City Ex. 16, p. 11, upper and lower pictures; Pub. Ex. 51; Pub. Ex. 12; P. 38 of Attachment to Ex. 67, Brett Helsa Debris Report, February 18,

1985; P. 55 of Attachment to Ex. 67, Brett Helsa Debris Report, February 18, 1985; TR. 91; TR. 137; TR. 244; TR. 260; TR. 1898; Tr. 2179.

D. Storage of debris and recyclable materials on Site 4 in violation of Section I and Section 1, Site 4 Use. As to vehicles on Site 4, the City has not established that unlicensed vehicles were inoperable. TR. 126-127; TR. 172-177; TR.

203-209; TR. 211-213; TR. 218-220; TR. 232-233; TR. 1898-1899; TR. 2049-2951; TR. 2179-2180; City Ex. 11, Site 4 pictures; City Ex. 14, Site 4 pictures; P. 39 of Attachment to Ex. 67, Brett Helsa Debris Report, February 18, 1985; Pub. Ex. 9; Pub. Ex. 10; Pub. Ex. 11; Pub. Ex. 15; Pub. Ex. 16; Pub. Ex. 17; Pub. Ex. 22; Pub. Ex. 49; Pub. Ex. 50.

E. Storage of vehicle parts on Site 5 outside of existing building without screening; storage of recyclable steel on Site 5 without racking or screening; and storage of wood on Site 5 without stacking or screening; all in violation of Section 1 and Section 1, Site 5 Use. City Ex. 11, Site 4 pictures; City Ex. 14. p. 2, lower picture; City Ex. 14, p. 3, upper picture; City Ex. 16, p. 5, lower picture; City Ex. 16, p. 6, upper and lower pictures; City Ex. 16, p. 7, upper picture; Pub. Ex. 43; Pub. Ex. 44; Pub. Ex. 51; P. 40 of Attachment to Ex. 67, Brett Helsa Debris Report, February 19, 1985; TR. 90-91; TR. 129-130; TR. 261-262; TR. 642; TR. 71 ; TR. 1899-1901

F. Storage of unauthorized items and recycling activities on Site 6, with improperly stored items protruding over the height of the fence in violation of Section 1, Section 1, Site 6, Use, and Section 1, Site 6, Conditions Imposed, part (c). City Ex. 11, Site 6 pictures; City Ex. 14, p. 4, upper and lower pictures; City Ex. 16, p. 7, lower picture; City Ex. 16, p. 8, lower picture; City Ex. 16, p. 9, upper and lower pictures; City Ex. 16, p. 10, upper picture; P. 41 of Attachment to Ex. 67, Brett Helsa Debris Report February 21, 1985; P. 53 of Attachment to Ex. 67, Brett Helsa Debris Report, Table 7. Pub. Ex. 52; Pub. Ex. 55; Pub. Ex. 56; Pub. Ex. 57; Pub. Ex. 58; TR. 86; TR. 88-90; TR. 131; TR. 262; TR. 328; TR. 358; TR. 679; TR. 1901-1902; TR. 1904; TR. 2069-2070.

G. Storage of items on roadway adjacent to Site 7, outside of partial fence on Site 7 and failure to fence totally the boundaries of Site 7, in violation of Section 1, Site 7, Conditions Imposed. Pub. Ex. 29; Pub. Ex. 59; TR. 274-275; TR. 294; TR. 1902-1903.

H. Storage of recyclable items, including metal scrap, other than as incident to sorting and dismantling, and the storing of refuse on Site 8, including trash and debris, improper screening of Site 8 with material protruding above those fences that were installed, all in violation of Section 1; Section 1, Site 8, Use; and Section 1, Site 8, Conditions Imposed. City Ex. 11, Site 8 pictures; City Ex. 14, p. 5, lower picture; City Ex. 14, p. 6, upper picture; P. 43 of Attachment to Ex. 67, Brett Helsa Debris Report, February 19, 1985; P. 52 of Attachment to Ex. 67, Brett Helsa Debris Report, Table 6; Pub. Ex. 38; Pub. Ex. 52; Pub. Ex 56; Pub. Ex. 57; Pub. Ex. 58; TR. 90; TR. 138-139; TR. 267; TR. 328; TR. 358; TR. 666-668; TR. 718; TR. 2180.

I. Storage of items other than wood or construction materials or items necessarily incident to the wood salvage process on Site 9; storage of wood and construction materials on Site 9 which are not neatly stacked; stored items outside of boundary fence on Site 9; all in violation of Section 1; Section 1, Site 9, Use; and Section 1, Site 9, Conditions, Imposed. The allegation as to the lack of fence on the southern boundary of Site 9 was not a charged violation. City Ex. 11, Site 9 pictures; City Ex. 14, Site 9 pictures; P. 45 of Attachment to Ex. 67, Brett Helsa Debris Report, February 22, 1985; P. 54 of Attachment to Ex. 67, Brett Helsa Debris Report, Table 8; Pub. Ex. 35; Pub. Ex. 36; Pub. Ex. 37; Pub. Ex. 60; TR. 135-136; TR. 267-268; TR. 301-302; 309-310; TR. 1905.

J. Storage of items on boulevard and other areas reserved for landscaping on Sites 1-9 inclusive, in violation of Section 1, Site 1, Landscaping; Section 1, Site 2, Conditions Imposed; Section 1, Site 3, Conditions Imposed: Section 1, Site 4, Conditions imposed; Section 1, Site 5, Conditions Imposed; Section 1, Site 6, Conditions Imposed; Section 1, Site 7, Conditions Imposed; Section 1, Site 8, Conditions Imposed and Section 1, Site 9, Conditions Imposed. City Ex . 11 , Site 5 pictures; City Ex. 11, Site 8, lower picture; (city Ex. 14, p. 1, upper and lower pictures; City Ex. 14, p. 3, lower picture-, City Ex. 14, p. 7, upper and lower pictures; City Ex. l6 p.. 1, upper picture; City Ex. 16, p. 2, upper picture; City Ex. 16, p. 5, upper and lower pictures; City Ex. 16, p. 6, lower picture-, City Ex. 16, p. 11, upper and lower pictures; City Ex. 16, p 12, upper picture; City Ex. 16, p. 14, lower picture; City Ex. 16, p. 16, upper picture; Pub. Ex. 2 9 .

22. Beermann received notice of each violation ultimately found, either in the original Notice of Hearing, dated June 21, 1985, or in the Amendment to Charges, dated August 23, 1985. He was afforded an adequate opportunity to prepare a defense both by the original notice and a continuation of the hearings after the amended charges.

23. the City's past efforts to obtain Beermann's compliance with the 1967 Conditional Use Permit and the 1981 Land Use Agreement-Conditional Use Permit, as amended, have been unsuccessful.

24. Beermann has repeatedly failed to comply with the requirements of the Land Use Agreement-Conditional Use Permit and there is good reason to believe that he will not comply with these requirements in the future. TR. 513; TR. 518; TR. 2955-2959.

25. A, conditional use permit remains in effect only as long as there is compliance with its provisions. Minn. Stat. 462.3595 (1984); Inver Grove Heights City Code 515.59(e).

26. Ile City has not acquiesced in Beermann's violation of the Land Use Agreement-Conditional Use Permit and its predecessor pernti: -and has, on a number of occasions instituted proceedings to obtain compliance. See, Beermann Ex. 69; Beermann Ex. 102; Beermann Ex. 103; Notice and Order for Hearing dated June 21, 1985.

2 7 The violations of the Land Use Agreement-Conditiorial Use Permit Found herein at Finding 21, supra, did not materially impact 'he public health or safety, but involved primarily aesthetic considerations.

28. Although Beermann is the only rubbish hauler in the City of Inver Grove Heights subject to a Land Use Agreement-Conditional Use Permit, he may not collaterally attack, in this proceeding, the propriety of the consentual agreement which is part of an outstanding mandatory injunction of the district court Ruling on Motion, August 5, 1985; Ex. 7.

29. the Beermann business does not qualify as a permitted nonconforming use and is not subject to a "grandfather" exception as are certain other haulers in the City of Inver Grove Heights.

30. In 1985, at the request of Beermann, other haulers in the City were inspected by Mr. Roesler. Beermann Ex. 27-30. The inspections did not disclose material code violations. Beermann Ex. 31-34; TR. 549-551; TR. 791-794.

31. In 1980, the City was the defendant in district court litigation when it attempted to prevent Triangle Services, a rubbish disposal service, from expanding its physical facilities in the City without a rezoning of its property from Agricultural to Light Industrial. Beermann Ex. 48; Beermann Ex. 101. The court required the granting of a building permit, reasoning that the activity was a valid continuation of an authorized noninforming use. Beermann Ex. 48.

32. In 1983, the City prosecuted another hauler, Marlon Danner, for violations of his July 28, 1980 Conditional Use Permit. City Ex. 55. A misdemeanor conviction was obtained and the City actively monitored his efforts at achieving full compliance for a period of at least one year. City Ex. 55.

33. CY October 29, 1980, the City informed another rubbish hauler that his operation was in violation of the City Code and threatened prosecution if the violations continued. City Ex. 59.

34. The City, in conjunction with Dakota County authorities, has a continuing investigation in progress regarding the activities of another rubbing hauler, Ben Oehrlein, and investigatory search warrants have been issued. Beermann Ex. 62.

35. The City has enforced its inoperable vehicle ordinances generally and against others in proximity to the Beermann property. City Ex. 100; TR. 396.

36. The City enforces its zoning ordinances both by inspection and citizen complaints. It has received citizen complaints regarding the Beermann operation. City Ex. 95; Ex. 94; TR. 558; TR. 1960; TR. 1964-1966; TR. 2011.

37. !le City has not been demonstrated to have knowingly failed to enforce its zoning laws against identified individuals or classes cof violators.

38. Al though the City Administrator and Planning Officer have formed opinions about the lawfulness of the manner in which Mr. Beermann conducts his

business, such opinions are based in fact from their contacts with Beermann and their observations of his premises. Personal motives of the City staff have not played a part in the City's enforcement efforts against Beermann.

39. Beermann is a major recycler in the Seven County Metropolitan Area. He is responsible for the recycling of material from, inter alia, the entire City of Minneapolis. If Mr. Beermann closed his recycling operations, either another firm would be required to engage In such activities, or landfill use would increase.

40. On June 10, 1985, the City Council of the City of Inver Grove Heights adopted a resolution authorizing the hearing herein. Resolution No. 3435.

41. On June 19, 1985, a Notice and Order for Hearing was issued on behalf of the City of Inver Grove Heights.

42. pursuant to an Order of the Hearing Officer dated September 18, 1985, the City was permitted to amend its allegations of violations of the Beermann Land Use Agreement-Conditional Use Permit Beermann was granted a continuance of the proceedings to prepare to defend the clarified and additional allegations.

Based on the foregoing Findings of Fact, the Hearing Officer makes the following:

## CONCLUSIONS

1. The Inver Grove Heights City Council and the Hearing Officer have subject matter jurisdiction herein pursuant to Minn. Stat. 462.351 - 462.364 and 14.55 (1985), and Inver Grove Heights City Code, Section 515 - Zoning Code.

2. Burnell Beermann received timely and proper notice of these proceedings.

3. The City has complied with all substantive and procedural requirements of statute, rule and due process and the matter is properly before the Hearing Officer.

4. The City is not estopped from enforcing the Land Use Agreement-Conditional Use Permit against Beermann.

5. Beermann may not attack collaterally in this proceeding the validity of the City's requirement of a land use agreement for the conduct of his

business while the Land Use Agreement is mandated by an Order of the district
court which remains in effect.

6. To prevent the application of a valid governmental requirement on the
basis of selective enforcement, the person against whom enforcement is sought
must establish by clear evidence, against a presumption of enforcement, that
public officials have intentionally and invidiously discriminated in
enforcement amongst persons in similar circumstances, so that the enforcement
sought would violate equal protection of the laws.

7. Beermann has failed to establish that the constitutional defense of selective enforcement prevents the City from enforcing the Land Use Agreement-Conditional Use Permit against him as a matter of equal protection of the laws.

8. The City must establish the violations of the Land Use Agreement-Conditional Use Permit alleged by a preponderance of the evidence.

9. The City has established by a preponderance of the evidence the violations of the Land Use Agreement-Conditional Use Permit enumerated at Finding 21, supa.

10. Engaging in the soci ally des irable activity of recycl ing provides no defense to the established violations of the Land Use Agreement-Conditional Use Permit.

11. Any Finding of Fact more properly termed a Conclusion and any Conclusion more properly termed a Finding of Fact are hereby expressly adopted as such.

As a consequence of the foregoing Conclusions, the Hearing Officer makes the following:

## RECOMMENDATION

As a result of the violation of its conditions, the Amended Conditional Use Permit granted Beermann in conjunction with the execution of the Land Use Agreement should be declared terminated by the City Council of Inver Grove Heights effective ; 1986, as a consequence of Inver Grove Heights City Code 515.59(e) and Minn. Stat. 462.3595 (1984).

Dated this 24th day of June, 1986.

BRUCE D. CAMPBELL
Administrative Law Judge

## NOTICE

It is respectfully requested that the City Council provide the Hearing Officer with a copy of its decision herein.

Reported: Transcribed from audio-magnetic recording by
Mary Ann Hintz
Court Reporter
Route 3, Box 130
Aitkin, Minnesota 56431

MEMORANDUM

Beermann has raised a variety of objections to the jurisdiction of the City and the procedures employed by the Hearing Officer and to the underlying assertions of violation of the Land Use Agreement - Conditional Use Permit. He also argues that his socially beneficial recycling activities should be considered by the Hearing Officer either to avoid the violations, or in mitigation.

1. JURISDICTION

Beermann Initially argues that the City and, as a consequence, the Hearing Officer are without jurisdiction to conduct the instant proceedings. Beermann relies on an asserted lack of authority on the part of the City to conduct hearings to revoke a conditional use permit. He states that he has been unable to find any authority supporting the City's ability to conduct hearings for the revocation of a conditional use permit. He further cites the methods to enforce a zoning ordinance contained in Minn. Stat. 462.362 (1984), which do not include administrative revocation hearings.

In State v. Larson Transfer & Storaqe, Inc., 310 Minn. 295, 246 N.W.2d 176 (1976) a case involving a criminal prosecution for violation of a conditional use permit, the court, in a footnote reference, stated:

> A conditional use permit is in the nature of contract between the city and a private party for the use of a piece of property. Consequently, non-compliance with a, condition attached to a permit is more analogous to a breach of a contract than to a criminal offense. There is no question that the city may revoke Allstate's permit for its failure to comply with the conditions. If Allstate continues to operate without the permit the city may then initiate a criminal prosecution for operating without a proper permit. (Emphasis added).

310 Minn. at 304, 246 N.W.2d at 182.

The reference by the Minnesota Supreme Court to the ability of the city to revoke a conditional use permit for failure to observe its conditions is in accordance with the decisions of the courts that have specifically considered the issue. In Smalleylogics Corporation v. Dade Countv, 176 So.2d 574 (Fla. App. 1965), the Court refused judicial relief when a county commission revoked a conditional use permit for failure to comply with its provisions. The Court

held that the action of the Board of County Comissioners of Dade County in revoking the conditional use permit for failure to observe its conditions, after notice and hearing, was within the inherent authority of the Board. See also, Eastwood Amusement Co. v. Stark, 325 Mich. 60, 38 N.W.2d 7 (1984). The court's holding in Smalleylogics Corp. v. Dade County, supra, has been cited as the rule by the commentators. See, Anderson, American Law of Zoning, (2d), 18.64 (1977).

Although Minn. Stat. 462.362 (1984), does not specify administrative hearings before the governmental body as a method of enforcing a conditional use permit, that statute has no application to the instant proceeding. The

City is not attempting to exact a penalty by way of enforcement from Beermann. Were it to do so, a proceeding in a court of competent jurisdiction would be the only method of either securing compliance with the permit or imposing a sanction for its violation. Here, the City is only attempting to make a finding of fact regarding whether Beermann has -failed to comply with its provisions. Both the governing statute and the City of Inver Grove Heights ordinances provide that a conditional use permit remains in effect only as long as the conditions agreed upon are observed. Minn. Stat. &LW\ RI ,QYHU *URYH +HLJKWV &RGH RI 2UGLQDQFHV 515.59(e) . Prior to the revocation of a property right, Beermann is entitled to a meaningful hearing as a matter of due process. Goldberg v. Kelly, 397 U.S. 254 (1970). It is only that meaningful hearing required by due process that the City is now providing.

Hence, the City may determine that Beermann has forfeited his Conditional Use Permit by failing to comply with its provisions. Its ability to do so is limited only by considerations of due process which include affording a procedurally fair hearing upon proper notice of the alleged non-conformance. See, Eastwood Park Amusement Co. v. Stark, 325 Mich. 60, 38 N.W.2d 7 (Mich. 1948). The issue then is whether Beermann has been afforded due process in this hearing procedure.

II. DUE PROCESS

Beermann asserts that the failure of the Hearing Officer to determine that the proceeding was governed by the contested case provisions of the Minnesota Administrative Procedures Act, Minn. Stat. 14.57 - 14.69 (1985), and the rules of the Office of Administrative Hearings deprived him of a fair hearing as required by due process. The reasoning of the Hearing Officer regarding the application of both the Minnesota Administrative Procedures Act and the rules of the Office of Administrative Hearings is fully contained in his Ruling On Motion, August 5, 1985. In that ruling the Hearing Officer determined that the hearings herein were not governed by the Minnesota APA or by the rules of the Office of Administrative Hearings, but by the concepts of a fair hearing inherent in the requirements of due process. The Hearing Officer concluded that in conducting these hearings he was the surrogate of the City Council.

The fundamental requirement of due process is the opportunity to be heard

at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The elements of a fair hearing required by due process include adequate notice of the charges sufficiently in advance of the hearing to allow the preparation of a defense. Hardy v. Independent School District No. 694, 223 N.W.2d 124, 128 (Minn. 1974); Pacific Livestock Co. v. Oreqon Water Board, 241 U.S.440, 453 (1916). The allegations of violation contained in the original Notice of and Order for Hearing were specific, giving Beermann a meaningful opportunity to prepare a defense. When it appeared that additional assertions of violations were to be advanced by the City, the Hearing Officer required the City to amend its charges to specify the alleged violations. He also continued the hearings to allow Beermann to prepare to meet the additional allegations.

The concept of due process also includes the following: an opportunity to be heard regarding all claims that may validly be raised in the proceeding, Pacific Livestock Co. v Oregon Water Board, supra; an opportunity to hear the

evidence introduced and to know the claims of the opponent, Philadelphia Co. v. Securities and Exchange Commission, 1 75 F.2d 808, 817 (D. C.Cir 1 948), app.dism., 337 U.S.901 (1949); an opportunity to introduce evidence and produce witnesses and explanation in rebuttal, National Labor Relations Board v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941); the right to cross-examine witnesses, Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U.S.88, 93 (1913); the right to make argument to the hearing officer and to the final decision making authority, Philadelphia Co. v. Securities and Exchange Commission, supra; having the decision of the board or officer governed by and based upon evidence adduced at the hearing, National Labor Relations Board v. Prettyman, supra; and to have the final decision supported by substantial evidence introduced at the hearing, Whitfield v. Hanges 222 F.2d 745, 749 (8th Cir. 1915).

A fair review of all of the rights afforded Beermann in this hearing, including continuances for preparation and latitude in the presentation of his case, leads Iwo the conclusion that the only asserted right not strictly afforded him was the application of Minn. Rules part 1400.6700, regarding discovery.

The Administrative Law Judge has previously determined that, assuming appropriate notice of charges, there is no due process right to discovery in an administrative hearing. Ruling on Motion, August 5, 1985. The leading Minnesota case so holding is Waller v. Powers Department Store, 343 N.W.2d 655 (Minn. 1984). Waller, supra, is in accordance with the majority rule. Silverman v. Commodity Future Tradinq Commission, 549 F.2d 28, 33 (7th Cir. 1977); Frilette v. Kimberlin, 508 F.2d 205, 208 (3rd Cir. 1974), cert. denied, 421 U.S. 980 (1975); In Re Del Rio, 400 Mich. 727, 256 N.W.2d 727 (1977), app. dism 434 U.S 1029 (1978).

While Beermann argues that the failure to apply the discovery rule of the Office of Administrative Hearings deprived him of due process, he does not assail the contrary authority previously cited by the Hearing Officer in his Ruling and relies only on a case involving adequate notice. Notice is not an issue in this proceeding.

Although the Hearing Officer did not apply the discovery rule of the Office of Administrative Hearings to this proceeding, the City voluntarily afforded Beermann the opportunity to discuss the case with its staff, to have the staff present at the hearing and to review all of its -riles regarding Beermann, including its trial exhibits. Again, several continuances were granted Beermann to review material in the possession of the City and to

afford him an opportunity to assess the material reviewed. When the hearing Officer concluded that he did not have direct subpoena power in this proceeding, he advised Beermann that Minnesota Rules of Civil Procedure 45.05 afforded him the ability to obtain district court subpoenas for this proceeding. Ruling on Motion, August 5, 1985. Counsel for Beermann did, in fact, obtain such subpoenas. While Beermann generally asserts prejudice, he does not specifically support that allegation.

Hence, the Hearing Officer concludes that Beermann has been afforded all the essential elements of due process in this proceeding and that the City has jurisdiction to conduct it by virtue of Its right to exercise governmental authority to determine whether a conditional use permit is revoked for noncompliance with its conditions.

III. EQUAL PROTECTION

Beermann next argues that equal protection prevents the City from enforcing the provisions of the Conditional Use Permit because it is based on a land use agreement which, he asserts, the City had no authority to require initially. As stated in the Ruling On Motion, August 5, 1985, the Hearing Officer has determined that Beermann may not raise in this proceeding the propriety of the requirement of a land use agreement which is mandated by a continuing injunction of the District Court. While a restatement of all of the reasoning underlying that conclusion is not required here, the following summary statement is -appropriate:

> The district court has ordered, in the form of' a continuing injunction that Beermann Services conduct its business in accordance with the Land Use Agreement dated May 11, 1981. That Order is a determination of the propriety of the Agreement. While it is true that the validity of the Agreement was not litigated but came as a result of a settlement agreement, that consideration is not material. An order made upon an agreed statement of the facts or entered by consent is as binding upon the parties as if made after protracted litigation. In re Bush's Estate, 302 Minn. 188, 224 N.W.2d 489, 582 (1974); Panglos v. Halpern, 247 Minn. 80, 76 N.W.2d 702, 706 (1956).

Ruling on Motion, August 5, 1985. Hence, the Hearing Officer concludes that Beermann may not relitigate in this proceeding the propriety of the Land Use Agreement while the consentual order of the district court in the form of a mandatory injunction is outstanding.

Beermann urges the Hearing Officer to reconsider his conclusion as a consequence of McBroom v. Al-Chroma, Inc., Finance and Commerce, May 6, 1986, p. 12 (Minn.App.). The Hearing Officer does not find the cited case to change the propriety of his conclusion in the Ruling On Motion. McBroom, supra, determined that the merger and bar elements of the doctrine of res judicata operate to preclude a subsequent suit on the same cause of action which has already been determined by a previous judgment, regardless of what issues were actually raised or litigated in the previous suit. Clearly, the propriety of the Land Use Agreement could have been litigated or raised in the previous action. It was only because the settlement was consentual, on the advice of counsel, that Beermann did not raise that issue. He is now estopped under

principles of bar and merger from relitigating an issue that could have been raised in that proceeding but is now foreclosed by a final order. Relief, if appropriate, should come in the district court rather than by an improper collateral attack.

Beermann also asserts that, in an enforcement proceeding, a defendant may always raise the issue that the requirement of the government is arbitrary and capricious and, therefore, in violation of constitutional rights. The Hearing Officer has previously determined that this is not an enforcement proceeding. Under normal principles of law, the Hearing Officer may not determine that an underlying ordinance oor here, an implementation of the Code contained in the Land Use Agreement - Conditional Use Permit, is itself unconstitutional. Wronski v. Sun Oil Co., 108 Mich. App. 178, 310 N.W.2d 321 (1981);

Starkweather v. Blair, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); First Bank v. Conrad, 350 N.W.2d 580 (N.D. 1984).

IV. ESTOPPEL

Beermann next asserts that the equitable doctrine of estoppel prevents the City from enforcing the provisions of the Land Use Agreement - Conditional Use Permit. A government agency may be estopped if justice requires. Mesaba Aviation Division of Halvorson of Duluth, Inc. v. County of Itasca, 258 N.W.2d 877, 880 (Minn. 1977). However, estoppel will not be ''freely applied against the government". Mesaba Aviation Division of Halvorson of Duluth, Inc. v. County if Itasca, supra. A party seeking to estop a governmental agency carries a heavy burden of proof. Brown v. Minnesota Department of Public Welfare, 368 N.W.2d 906, 910 (Minn. 1985). Some element of fault or wrongful conduct must be shown, and "the court will weigh the public interest frustrated by the estoppel against the equities of the case." Brown v. Minnesota Department of Public Welfare, supra.

Reliance is placed on the recent decision of the Minnesota Court of Appeals in Halberq Construction and Supply Co. v. Minnesota Transportation Regulation Board, Finance and Commerce, April 25, 1986, p. 3 (Minn.App.). The Hearing Officer finds that Halberg, supra, has no application to the instant proceeding. In that case the Court found that the petitioner had never been informed of the scope of his geographic authority. In this case there is no doubt that Beermann had received a copy of the Land Use Agreement which he and his counsel, in fact, negotiated with the City Council. Hence, any argued reliance by Beermann on an ability to depart from the requirements of the Land Use Agreement Conditional Use Permit must be contrary to fact.

The Court Halberg, supra, also stressed conduct On -the Part Of the government which induced a reasonable and substantial detrimental reliance by the citizen. Again, Beermann can point to no conduct on the part of the City which would make it unconscionably inequitable to enforce the requirements of the Land Use Agreement - Conditional Use Permit. As noted in the Findings, the City, from the current date back even before 1980 , had indicated to Beermann that the operation of his business was in violation of the governing

ordinances. Over the course of several lawsuits, warning letters and numerous inspections, the instant proceedings ensued. The relationship) between the City and Beermann regarding the subject of compliance with the Land Use Agreement - Conditional Use Permit makes any argument of justified reliance on the City's conduct unrealistic. Under any fair interpretation of the facts adduced at the hearing, the inescapable conclusion is that Beermann could not have relied on any conduct on the part of the City which would give rise to an equitable estoppel under Halberg, supra.

V. SELECTIVE ENFORCEMENT

Beermann next argues that the selective enforcement by the City of the zoning ordinances against others similarly situated prevents the City from enforcing the Land Use Agreement - Conditional Use Permit against him as a matter of equal protection. The Briefs of the parties state at length the law relevant to the claim of selective enforcement as a violation of equal protection and no lengthy restatement of the precedent is required.

To establish selective enforcement, the person against whom enforcement is sought must clearly establish, against a presumption of enforcement, that governmental officials have intentionally, deliberately or systematically failed to enforce penal regulations against a class of violators expressly included within the terms of the regulation while enforcing it against others. State v. Vadnais, 295 Minn. 17, 202 N.W.2d 657 (1972); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Mere laxity in enforcement or the failure to prosecute all violators is not sufficient to establish a claim of selective enforcement. S.S. Kresge Co. v. Davis, 178 S.E.2d 382 (1971); State v. Vadnais, 295 Minn. 17, 202 N.W.2d 657, 660 (1972); Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 143 N.W.2d 813 (1966). The gravamen of the defense is prohibited invidious discrimination and bad faith.

Despite the wide latitude afforded Beermann in the presentation of this defense, the Hearing Officer concludes that Beermann has not sustained his burden of proof for the reasons hereinafter enumerated.

As noted in the Findings, the City has proceeded against others most similarly situated to Beermann. They have undertaken enforcement action through court proceedings against two rubbish haulers, have appeared in a court proceeding in opposition to the expansion of the business of another rubbish hauler and, finally, have informed another rubbish hauler of violations of the zoning code. See Findings 31 - 34, supra. When Beermann complained to the City of the possibility of selective enforcement, it sent its inspector to review the operations of all other haulers within the City and no material code violations were disclosed. See Finding 30, supra. It has enforced its inoperable vehicle ordinance generally and in the area surrounding the Beermann property. See Finding 35, supra. Moreover, the City not only conducts inspections, but responds to individual citizen complaints.

To establish selective enforcement Beermann relies on two major factors: asserted animosity between City staff and himself; and pictures of property in Inver Grove He ight s as sertedly v iol at ing the zoning ordinance s .

The City Administrator testified that, as a private citizen, he had definite opinions about the manner in which Beermann conducted his business. The City Planner also so testified. There is no evidence, however, that Beermann was the subject of a vendetta by the City staff. It would be unreasonable to require the City staff not to have formed opinions about Beermann's compliance with his Land Use Agreement - Conditional Use Permit after dealing on that subject with him for a protracted period of time and visual observations of the property. Beermann has not shown any conduct on the part of the City staff that establishes bad faith or invidious d i s cri ninat i on.

With respect to the pictures contained in Beermann Ex. 64, the Hearing Officer concludes that they do not establish selective enforcement. Initially, there is no showing that City officials were aware of any violations demonstrated in the photographs and consciously and systematically failed to enforce the appropriate zoning regulations while proceeding against Beermann. The testimony of the staff is strictly to the contrary. Moreover,

there is no showing that each picture does, in fact, depict a violation of the
zoning ordinances. Finally, Beermann has not shown that all of the pictures represent persons who are similarly situated to him, either in the scope of their business or the extent of the totality of his violations.

While an individual assessment of each picture in Beermann Ex. 64 is not required, certain observations about their content are appropriate. Many of the pictures are of the premises of rubbish haulers against whom the City has enforced its zoning ordinances, including Oehrlein. Findings 31-34, supra. Such pictures also did not depict the conditions of the properties at the time of City inspection. Finding 30, supra. Some of the asserted violations shown, such as noxious weeds growing, have no relationship to the violations asserted against Beermann. Portions of Beermann Ex. 64 show apparently abandoned junk vehicles. The evidene adduced at the hearing demonstrate that the City routinely enforces its abandoned vehicle ordinance. Finding 35, supra. Some of the photographs depict residential wood storage, not neatly stacked. Residential wood storage is not analogous to Beermann's wood recycling operation on Site 9 and the storage condition imposed on him comes from the Land Use Agreement-Conditional Use Permit, not a general zoning law applicable to all citizens.

Beermann also argues that the prime use by the City of citizen complaints for its investigatory method, itself, establishes discriminatory enforcement, relying on Simonetti v. Birmingham, 314 So.2d 83 (1975). As noted by the City in its Post-hearing Memorandum, Simonetti, supra, does not represent the majority rule. Post-hearing Memorandum of the City of Inver Grove Heights, April 30, 1986, pp. 13-14. The majority of the reported decisions uniformly hold that prosecution based upon citizens' complaints does not establish discriminatory enforcement State v. Weniger, 687 P.2d 643 (Ka. 1984); Meristem Valley Nursery, Inc. v. Metropolitan Dade County, 428 So.2d 726 (Fla. (1983) Pier 1 Imports Inc. v. Pitcher, 270 So. 2d 228 (La. 1972) City of South Euclid v. Bondy, 200 N.E.2d 508 (Ohio 1964).

The Hearing Officer determines that Beermann has failed to carry the heavy burden required to resist the enforcement of a valid zoning requirement based on the defense of selective enforcement. He has shown, at most, some violations that have gone uncorrected. Beermann has -railed to show the knowing and systematic failure to enforce the zoning regulations against others similarly situated that would violate equal protection.

VI. GOVERNING DOCUMENT

Beermann next contends that his obligations with respect to zoning in the

City of Inver Grove Heights are not controlled by the Land Use Agreement-Conditional Use Permit but are, in fact, an ama again of the site plan submitted to the City Council, oral representations made by his attorney and unidentified parties when the Agreement was being negotiated and an expansive reading of the Land Use Agreement to authorize the activities conducted at the subject premises. The Hearing Officer finds that the record clearly establshes that the Land Use Agreement subsequently executed by the Mayor of the City of Inver Grove Heights and Beermann is, in fact, the Conditional Use Permit authorized by the City Council on May 11, 1981. It is clear that the draft agreement was in existence prior to the night the City Council met on the grant of a Conditional Use Permit and that both Beermann and his counsel had an opportunity to review the document. Moreover, certain amendments were specifically discussed in meetings between Beermann and members of .he City Council on the night the permit was granted. Those specific changes, including one reference to the word "primarily" instead of "only", as describing a permitted use, were integrated into the final document signed by

the Mayor and Beermann. Beermann also testified that he had an opportunity to review the document prior to its execution and did check for changes of particular interest to him. Hence, it is clear that the Land Use Agreement, although unexecuted, was in existence when the City Council, by resolution, made the provisions of that Agreement the Conditional Use Permit granted Beermann.

Hence, the Hearing Officer finds that Beermann's obligations in the operation of his business are fully described in the Land Use Agreement-Conditional Use Permit, as amended and interpreted. Other understandings, interpretations or desires of Beermann were merged into the document as finally executed.

Beermann argues that the document is not to be literally construed according to the plain content of its language but in some ill-defined, more liberal fashion. A land use agreement or conditional use permit is to be construed in the same manner as an ordinance or statute. Adrian Mobile Home Park v. City of Adrian, 94 Mich.App. 194, 288 N.W.2d 402, 403 (Mich.App. 1980) Recognized principles of statutory construction require that, in interpreting the Land Use Agreement-Conditional Use Permit, words are to be interpreted in accordance with their ordinary and recognized meaning. Minn. Stat. 645.08(l) (1984). Moreover, when the words of a provision in the application to an existing situation are clear and free from ambiguity, the letter of the writing must not be disregarded under the pretext of pursuing its spirit. Minn. Stat. 645.016 (1984). Here, the provisions of the Land Use Agreement-Conditional Use Permit are explicit, clear and free of ambiguity. Section I of the document states that only uses authorized in later sections are permitted. Each separate delineation of a site, with the expectation of the description of the residence property, specifies that the property be used only for particular uses and that Beermann engage in specified actions with respect to each particular site. Under those circumstances, the Administrative Law Judge cannot adopt Beermann's expansive interpretation of the Land Use Agreement-Conditional Use Permit as authorizing the activities discussed in the Findings. When the word "primarily" was to be substituted for the word "only", as describing an authorized activity, the substitution was specifically made in the text. . The exact specificity of the

document and its careful preparation to terminate litigation also make it unlikely that the document was only to be used as a skeletal enumeration of authorized activities and Beermann's responsibilities.

Beermann's relies on Beermann Ex. 89, p. 5, a decision of the City Council sitting as a Board of Adjustment and Appeal, to demonstrate that the document executed in 1981 was not meant to strictly govern the conduct of the Beermann business on the subject premises. In that Exhibit, 'the City Council authorized Beermann to have present on Site 9 equipment required for or incidental to the wood separation, process, including dumpsters, log trucks, wood hauling trucks and wood splitters. Such equipment is necessary to the wood separation operations and does not enlarge the permitted uses of Site 9. Under such circumstances, the interpretation merely stated what was inherent in that section of the document and provides no argument that the limitations on use contained in the Land Use Agreement-Conditional Use Permit are only primary uses and that other secondary uses are permitted. That such is the case is demonstrated by a further reference to Beermann Ex. 89, p. 5, wherein the City Council, sitting as a Board of Adjustment and Appeal, determined that the Land Use Agreement conditions for Site 9 do not authorize the storage of

non-wood construction materials, that the dates stated in the Land Use Agreement were absolute completion dates and that no further discussion regarding uses on Site 4 or interpretation of the uses to which Site 4 might be put would be appropriate.

Hence, the Hearing Officer finds that Mr. Beermann's obligation to the City in the operation of his business under the zoning ordinances are as stated in the Land Use Agreement-Conditional Use Permit, as amended and interpreted. The document is to be construed in accordance with principles applicable to statutes and ordinances and the Land Use Agreement-Conditional Use Permit is not merely a skeletal outline of Beermann's obligations, subject to his perception of the necessities of the conduct of his business.

VII. EXISTENCE OF VIOLATIONS

Beermann also contends that no appreciable violations of the Land Use Agreement-Conditional Use Permit have been established by the City. He argues that certain of the evidence advanced by the City does not authoritatively establish the asserted violation. The Hearing Officer has reviewed all of the evidence relied upon by the City to establish the violations, primarily, the pictures contained in the public exhibits and those taken by Mr. Roesler. The Hearing Officer has also reviewed other exhibits and portions of the transcript bearing on the existence of violations. The Hearing Officer has enumerated, in Finding 21, supra, the specific evidence in the record upon which he relies for each individual violation found. As noted in the Findings, the Hearing Officer concludes that the City has established the violations alleged with two exceptions: the presence of inoperable, unlicensed vehicles on Site 4; and the failure to fence the southern boundary of Site 9. With respect to the latter allegation, the Hearing Officer is certain that Beermann has not provided the required fencing but that the violation was not contained in either the original Notice of Charges or the Amended Notice of Charges.

The testimony and pictures affirmatively establish the violations asserted. It should also be noted that the testimony of witnesses about conditions at different times and photographs taken on various dates demonstrate the violations. This is not a case in which a photograph was unfairly taken at one point in time when the situation depicted was not representative.

VIII. ACTION RECOMMENDED

Having found the violations established in Finding supra, the final consideration is the appropriate action, if any, to be taken against the Beermann Land Use Agreement-Conditional Use Permit., Beermann asks that, in light of his socially beneficial recycling efforts and good faith attempts at compliance, his Land Use Agreement-Conditional Use Permit not be declared

revoked. IN requests a period of time to come into compliance.

The fact of violations, however, terminates the Permit; the Council appears to have little discretion. Minn. Stat. 462.3595 (1984); Inver Grove Heights City Code 515.59(e). While the suggestion of Beermann has surface appeal , apart from the law, this is not the first time that Beermann has made such a request or that the City has attempted to secure compliance. It is fair, on a review of the record, to conclude that the history of the City's

attempts to regulate the conduct of the Beermann business has been one characterized by efforts at conciliation, promises to correct the condition and then finally some form of enforcement procedure. On each occasion, Beermann has, in undoubted good faith, expressed his desire, in the abstract, to comply with the requirements of law. On each occasion, however, when, in his mind, the changing conduct of his business so required, his efforts at compliance ceased. The Hearing Officer concludes that Beermann's principal interest is in recycling. He is interested in his legal obligations, primarily, when, as a last resort, the City abandons conciliation in favor of enforcement.

Given the history of the enforcement efforts of the City regarding the Beermann property and the magnitude of the violations, the Hearing Officer cannot recommended that the City take no action regarding the Beermann Land Use Agreement-Conditional Use Permit and attempt further voluntary compliance. At some point, "one more chance" is inappropriate and the City must enforce its zoning code. The Hearing Officer is convinced that that time has come for Beermann Services. He is not unmindful of the socially beneficial recycling service provided by Beermann or the marginal workers Beermann employs in his business. Even those conducting a socially useful operation, however, must do so in accordance with the governing law.

The only accommodation to Beermann that the Hearing Officer might suggest is a revocation of the Land Use Agreement-Conditional Use Permit effective at a specified date in the future. That would give Beermann an opportunity either to attempt to secure a permit which more closely meets the requirements of his recycling operations or to challenge the necessity of the Land Use Agreement in district court.

B.D.C.